

CEPS Policy brief

No. 124 • March 2007



Merging Security from the Two-Level Game: Inserting the Treaty of Prüm into EU law?

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On 27 May 2005, seven EU member states signed the Prüm Treaty to promote cross-border cooperation, aimed particularly at combating terrorism, cross-border crime and illegal migration. In response, we published a critical analysis of the measure,¹ in which we expressed reservations on three grounds:

- The treaty format in a field of EU activity produces negative externalities for the EU's area of freedom, security and justice by circumventing the EU framework;
- Reverting to an intergovernmental arena excludes the European Parliament at a time when its role in democratic scrutiny of the area of freedom, security and justice is critical;
- The effect of the Prüm Treaty is to weaken the EU rather than to strengthen it, as it postpones an important debate among all the member states about cross-border cooperation in policing and creates the impression that a small group of member states seek to impose their view on the rest.

In our analysis of the Treaty of Prüm, we examined the provisions on terrorism, illegal immigration, the logic and implications of data exchange and the continuity of the project from its 'Schengen' roots. We concluded that by

setting up exclusive and competitive measures that seek to address threats that affect the EU as a whole, it blurs the coherence of EU action in these fields; by developing new mechanisms of security that operate above and below the EU level, it dismantles trust among member states and by establishing a framework whose rules are not subject Parliamentary oversight, the treaty impacts on the EU principle of transparency.

The Treaty entered into force among Austria, Germany and Spain on 23 November 2006. The rest of the signatory partners are still ratifying the treaty. In the meantime, Italy, Portugal, Slovenia, Finland, Sweden and Romania have all formally notified that they wish to join the treaty. Another four member states – the Czech Republic, Ireland, Poland and the UK – have expressed qualified interest.² As we noted in our Policy Brief, because the original treaty engaged only seven member states it did not trigger the closer cooperation provisions of the Treaty on European Union which applied (in 2005) only when eight or more member states were involved. Thus, all of the EU institutions were

outside the mechanisms of the Prüm Treaty – including the Council. Once further member states became involved, it was not entirely clear whether the closer cooperation provisions would apply ex-post. That scenario looks likely to be avoided now as a result of the German Delegation's submission on 6 February 2007, of a proposal for a Council Decision that would integrate parts of the Prüm Treaty into the EU's Third Pillar.³ The proposal was further refined in a draft of 27 February 2007.⁴

This paper examines the proposal to incorporate parts of the Prüm Treaty into EU law, as opposed to the original Prüm Treaty. Particular attention is paid to the issues that we highlighted as problematic in our original assessment and comment on how they have been dealt with.

The Objective

The Germany Presidency set out its position on the incorporation of the Prüm Treaty in a note to the Council on 5 February 2007.⁵ It stated as its objective the implementing of Article 1(4) Prüm Treaty which calls for its incorporation into the EU within three

¹ Thierry Balzacq, Didier Bigo, Sergio Carrera and Elspeth Guild, *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats*, CEPS Working Document No. 234, Centre for European Policy Studies, Brussels, January 2006.

² J. Crosbie, "Germans struggle to turn police accord into EU law", *European Voice*, 8-14 February 2007, p. 3.

³ Council Document 6002/07.

⁴ Council Document 6566/07.

⁵ Council Document 6003/07

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years of entry into force. In fact, the proposal comes only months after the first entry into force of the agreement, and that with only three of the seven original parties. It would seem that the Presidency is very eager to resolve the anomalous position of the Prüm Treaty dealing with issues under discussion in the Commission and the Council among the 27 but engaging only seven member states. The alacrity with which this proposal has come indicates that our concerns about the overall effect of the Prüm Treaty on the EU's area of freedom, security and justice are shared at least in some quarters. The support from a group of member states outside the Prüm Treaty but who wish to join also indicates that quite a few member states are concerned about the development of rules which are intended to become EU rules outside the EU framework. They want to join as quickly as possible to be able to influence how those rules are formulated.

The Excluded Provisions

The Prüm Treaty includes many provisions that touch upon areas of competence in the First Pillar of the EU. We raised the question of the compatibility of such provisions with EU law and whether the Prüm Treaty could really be considered as consistent with the member states' obligation of good faith (Article 10 EC) where it appeared likely to result in different legal measures than in the First Pillar which is legally binding on all member states and in respect of which the Commission has a monopoly of initiative. In the Presidency note to Council, it states that the Third Pillar measures would be covered by the proposal for a Decision. The question of the First Pillar measures was left open. The JHA Council meeting of 15 February 2007 approved the approach of integrating the Third Pillar, i.e. policing and criminal justice aspects of the Prüm Treaty into a Framework Decision. Nothing was said about the First Pillar aspects of the Prüm Treaty.⁶

In the Prüm Treaty, Article 27 provides for cooperation among competent authorities upon request in the provision of substantial information on

individuals and objects in the context of the crossing of the EU's internal borders. The Presidency's note of 5 February acknowledges that this provision covers an area dealt with by the Schengen *acquis* and therefore should not be included in the proposal for a Council Decision to integrate the Prüm Treaty. It further notes that in any event, most of the issues dealt with in Article 27 have been satisfactorily treated in Framework Decision 2006/960 on simplifying the exchange of information and intelligence between law enforcement authorities of the member states.

Both of these exclusions are to be welcomed. The coherence of EU law can only be enhanced when the member states act together in a coherent and unified manner within the structure of EU law in fields for which competence has been transferred to the EU rather than making side agreements with one another.

Finally, at the 15 February JHA Council meeting it was agreed also to exclude the 'hot pursuit' provision of the Prüm Treaty which allows cross-border police intervention in the event of imminent danger.

DNA Profiles

The Prüm Treaty provides for a mechanism to access national DNA profiles for the investigation of criminal offences via the national contact points set out in the treaty. Automated searches by comparing DNA profiles, limited to individual cases, must be permitted by the parties. Similarly access to fingerprint data is also permitted and searches on vehicle registration data. All of these provisions are retained in the proposal for a Council Decision. However, as the Presidency notes in its paper of 5 February, there are many technical questions that lay behind the principle of access, not least the technical conditions for the exchange of DNA, fingerprint and vehicle registration information. This is particularly the case in light of the enlargement of the number of member states participating and the different standards they use.

In the conclusions of the 15 February JHA Council, the Presidency is at pains to justify the exchange of DNA records in the context of policing on the basis of

the initial experiences of using the Prüm Treaty between Austria and Germany. The Presidency claims that the German authorities matched DNA profiles of open cases against data held by Austrian authorities and found hits in more than 1,500 cases. It acknowledges, however, that every hit needs to be examined carefully and that it is not possible to clear up open cases by a DNA hit alone.

Major Events

In the Prüm Treaty, provision was made for the supply of personal and non-personal data for the prevention of criminal offences and in maintaining public order and security for major events with a cross-border dimension. These provisions have been retained, and still lack any clear precision on their extent or application.

Provisions on Terrorism

Here again many of the provisions of the Prüm Treaty have been transferred into the draft Council Decision in particular on the supply of information to other member states' national contact points, on request. However, in this part of the Prüm Treaty are to be found rather controversial provisions on the deployment of air marshals. These provisions have been quietly dropped from the draft Council Decision. At the time the Prüm Treaty was signed, there was substantial disagreement among the member states on whether to use air marshals or not. The inclusion of the provisions in the Prüm Treaty was something of a slap in the face to those member states that were opposed to the very principle. The abandonment now of these problematic provisions is wise in the interest of coherence in the EU.

Other Forms of Cooperation

These provisions permit the establishment of joint patrols and other joint operations in which designated officers or other officials of other member states participate in operations within a member state's territory. These provisions leave wide latitude to the member states to agree on mechanisms. The provision for hot pursuit across borders by law enforcement agents (Article 48 Prüm and Article 18 in the first draft Council Decision) has been dropped, following the 15 February JHA Council meeting. This provision

⁶ Press Release 2781st Council Meeting 15 February 2007, Council Document 5922/07.

would permit officers of one member state to cross the borders of another member state within strict limits to avert immediate danger to life or limb. This part also covers assistance in connection with mass gatherings and serious accidents as well as the use of arms, ammunition and equipment.

Data Protection

The provisions on data protection contained in the Prüm Treaty are reproduced in the draft Council Decision. I will not analyse here these provisions against the EU standard in the First Pillar on data protection (Directive 95/46). However, such an analysis together with a review of the current state of the proposed Framework Decision on data protection will be needed before the draft Council Decision is adopted. The adequacy of EU data protection provisions is becoming an ever-more sensitive issue as the exchange of personal data proposed by measures being adopted in the Third Pillar increases. This is not only an issue for this proposed Decision. There is increasing diversity of data protection provisions in different measures adopted in the Third Pillar. The Schengen Information System II Regulation contains its own data exchange and protection provisions as does the Regulation establishing the Visa Information System. The ongoing concerns about sharing Passenger Name Record data with the US hinge very centrally on the adequacy of US data protection measures.⁷

The Mechanism of a Council Decision

One of the criticisms that we made in our earlier work about the original Prüm Treaty was the marginalisation of the European Parliament. The use of a Council Decision procedure means that the European Parliament is now entitled to submit its opinion on the proposal. The Presidency has in fact requested the European Parliament to do so. While the opinion procedure is one of the weakest of the European Parliament's engagements in the law-making process, at least it is involved.

Conclusions

The three main issues that we raised regarding the Prüm Treaty in 2006 have now been addressed, at least to some extent, as follows:

- The treaty format is being abandoned in favour of a proposal for a Council Decision. This will engage all the member states; this will enhance the EU's area of freedom, security and justice in so far as there will be coherence in the mechanisms by which legislation is adopted.
- The European Parliament is now involved in the process, albeit without strong powers of supervision. The Presidency has already called upon the European Parliament to present its opinion on the draft Council Decision.

- Important debates on the content of the Prüm Treaty can now take place in the EU institutions. Already it is clear that some contentious provisions of the Prüm Treaty, such as those regarding air marshals, have been quietly removed. Similarly, the provisions on information exchange have been watered down, an acknowledgement of which may be the Hague Programme's position on the principle of availability which runs in opposition to some provisions included in the Prüm Treaty.

There are still many questions that remain regarding the Prüm Treaty, for instance what will be its effect after some of its provisions become part of a Council Decision. Nevertheless, the process for agreeing measures in sensitive fields of policing and data exchange at least now encompasses all the member states. The risk of a small oligarchy appearing to impose their preferred options on the whole of the EU has receded somewhat as a result.

As regards the contents of the draft Council Decision, among the most important aspects that has yet to be examined in detail is the adequacy of the data protection provisions. It is hoped that the European Data Protection Supervisor and the Article 29 Committee will provide opinions soon on the adequacy of the proposed provisions.

⁷ European Parliament Recommendation P6_TA(2006)0354 of 7 September 2006.